No. 02-658

IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR TECK COMINCO ALASKA INCORPORATED IN SUPPORT OF PETITIONER

ROBERT T. CONNERY
MARCY G. GLENN
HOLLAND & HART LLP
555 Seventeenth Street
Suite 3200
Denver, Colorado 80202
(303) 295-8000

* Counsel of Record

LAWRENCE L. HARTIG
ROBERT J. MAHONEY*
HARTIG RHODES HOGE & LEKISCH
717 K Street
Anchorage, Alaska 99501
(907) 276-1592

Counsel for Teck Cominco Alaska Incorporated

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. BOTH THE LAW AND THE FACTS SUPPORT ADEC'S DECISION	3
II. COMINCO'S PERMIT WILL NOT RESULT IN HARM TO THE ENVIRONMENT	9
CONCLUSION	13

Respondent's Rule 29.6 Statement appears at Resp. Br. ii.

TABLE OF AUTHORITIES

Page

CASES:

Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1980) 9, 10

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 9

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co. 463 U.S. 29 (1983) 6

STATUTE:

42 U.S.C. § 7479(3) 4, 9

REGULATIONS:

40 C.F.R. § 50.11(b) 10

40 C.F.R. § 51.166(c) 10

61 Fed. Reg. 1800 (1996) 3

ADMINISTRATIVE PROCEEDING:

In re Inter-Power of New York, Inc., PSD Appeal Nos. 92-8 & 92-9, 1994 WL 114949 (E.A.B. 1994) 5

OTHER AUTHORITIES:

NANA & Cominco, Ltd., *Shared Values, Common Goals, Exceptional Results: The Red Dog Mine Story* (available at: http://www.teckcominco.com/articles/operations/rd-sharedvalues.pdf) 12

OTHER AUTHORITIES:

Richard W. Phelps, *Leader of the Pack – Red Dog Mine "Grows Up,"* Eng'g & Mining J. (May 1998) (available at: http:/e-mj.com/ar/mining_leader_packred_dog/) 10

Teck Cominco Alaska Incorporated, *A Unique Partnership at the Red Dog Mine: A Model of Cooperation* (available at: http://www.teck cominco.com/presentations/dh-rd-partner-may02.pdf) 12

U.S. Census Bureau, *U.S. Census 2000: Alaska: 2000* (June 2003) 10, 11

Alaskan Communities: Northwest Arctic Census Region (available at: www.ilovealaska.com/alaska/boroughs.cfm? bid=28) 11

Communities: *Red Dog Mine* (Nov. 15, 2002) (available at: http://www.beringsea.com/ communities/index.php?community=312) 10

IN THE

Supreme Court of the United States

No. 02-658

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR TECK COMINCO ALASKA INCORPORATED IN SUPPORT OF PETITIONER

ARGUMENT

The Alaska Department of Environmental Conservation ("Alaska" or "ADEC") has explained in detail why the governing statute does not provide EPA with unilateral veto power over discretionary BACT determinations that Congress entrusted to the State. As Alaska has shown, the proper remedy for any party concerned about a State's exercise of the discretion afforded by the Clean Air Act is completion of the State's own administrative and judicial review procedures. Such procedures have been, and will continue to be,

fully adequate to address all of EPA's concerns about arbitrary agency action.

Cominco will not repeat those arguments here. Instead, Cominco responds to clarify certain assertions made by EPA and its amici regarding Cominco and its permit. As shown below, ADEC's decision is fully justified in both law and fact. And as evidenced by the reasonable permit proposals made by Cominco and accepted by ADEC, Cominco takes seriously its commitments to preserve the environment in which it operates and to promote balanced economic development in the local region.

Had ADEC's decision gone through the administrative and judicial review procedure afforded by Alaska law, Cominco is confident the decision would have been sustained in full. But since EPA proceeded instead with a unilateral veto authority it does not have, Cominco and ADEC were deprived of the opportunity to create a full factual administrative record, and ADEC's decision was stripped of the substantial deference it would have been owed on judicial review. All this is further reason why the Court should enforce the statute as written and hold that EPA does not have such authority. The EPA's interpretation not only destroys Congress's cooperative federalism scheme, but subjects applicants like Cominco to intolerable uncertainty by continually raising the prospect that EPA might by fiat unilaterally override a State determination even after that determination becomes final under state law. *See* Cominco Br. 5-7.[1]

---

[1] Cominco advised the Ninth Circuit that the record tendered by EPA, on which the agency purportedly based its enforcement orders, was inadequate to evaluate the merits of ADEC's underlying decision. *See* Cominco Alaska Incorporated's Response to the Court's August 3, 2001 Order 5-6 (Aug. 17, 2001); *see also* Petitioners' Combined Reply Brief 1-3 (Sept. 5, 2000). Had the matter proceeded through Alaska's *de novo* administrative review process, all parties would have had the opportunity to create a complete factual record. Even on the present incomplete record, however, ADEC's decision is fully supportable.

I. BOTH THE LAW AND THE FACTS SUPPORT ADEC'S DECISION

At bottom, EPA asserts that it has authority to override ADEC's permitting decision because the decision was, in EPA's view, arbitrary and capricious. The statute, however, makes clear that the *State* is entrusted with the discretion to make BACT determinations, and the concerns raised by EPA are fully addressed by the available state administrative and judicial review procedures, which EPA itself requires as a precondition to approving a state CAA implementation plan in the first place. *See* 61 Fed. Reg. 1800, 1882 (1996). But in any event, even if EPA's own view of its authority were correct, its determination that ADEC acted arbitrarily or unreasonably is incorrect and EPA thus lacks veto authority even under its own view of the law.

1. EPA's argument that ADEC acted arbitrarily rests ultimately on a single premise: that ADEC had a legal duty to determine Cominco's ability to pay for SCR and to impose SCR if the technology was economically feasible for the company. EPA Br. 26-27, 49-50; *see also* Environmental Defense Br. 27-28 & n.28. EPA has taken a position that neither the Clean Air Act, its legislative history, nor EPA's own prior guidance on the statute can support. Cominco did not open its books to ADEC – it did not attempt to prove that installing SCR would force it into bankruptcy – both because it was unwilling to divulge its confidential financial affairs and because that information was not in fact a necessary part of the agency's economic analysis.[2] ADEC appropriately

---

[2] EPA requested Cominco to provide "an analysis of the specific economic impacts of requiring SCR at the Red Dog Operations with a projection of the cost per unit of production." J.A. 134. Cominco declined to provide that information in part due to "concerns related to confidentiality." *Id.* However, Cominco did

considered the economic impacts of selecting SCR as BACT in accordance with EPA's published guidelines. Under that *correct* analysis of economic impacts, ADEC's selection of Low NOx as BACT was not arbitrary or capricious.

The Clean Air Act requires the state permitting authority that determines BACT to take into account, *inter alia*, "economic impacts and other costs." 42 U.S.C. § 7479(3). Nothing in this language can be read as requiring a state to evaluate the economic impact of a particular control technology upon the individual permittee. Nothing in the Act's legislative history supports any such mandate. In fact, EPA's own guidance document counsels against consideration of "the economic situation of the individual source." Rec. 71-115 (EPA New Source Review Workshop Manual).

Rather, as EPA admitted prior to this case, "[i]n the economic impacts analysis, primary consideration should be given to quantifying the cost of control." *Id.* As stated by EPA's Environmental Appeals Board ("EAB"):

> Cost-effectiveness usually involves two considerations. First, the permit writer must evaluate whether the total cost per ton of control for the pollutant is within the range of costs being borne by similar sources also charged with controlling the pollutant. Second, the permit writer should evaluate the comparative cost-effectiveness of serious control options to determine their incremental cost-effectiveness.

---

review for EPA the extent of its then-current debt ($400 million), its losses at the Mine due to a drop in zinc prices (over $150 million), and its prior investment in environmental improvements at the Mine (over $50 million). *Id.* at 134-35. Separately, Cominco told EPA that the cumulative cost of installing and operating SCR over the 40 remaining years in the projected life of the Mine would be "very significant, substantially affecting Cominco's cost of production." Rec. 56-003.

In re Inter-Power of New York, Inc., PSD Appeal Nos. 92-8 & 92-9, 1994 WL 114949, at *4-5 (E.A.B. 1994).

Despite the clarity of EPA's position on the proper economic analysis, EPA chose this permit proceeding for a new approach. Thus, contrary to the guidance in its New Source Review Manual, in late 1999 – after release of both the Preliminary TAR and the draft Final TAR – EPA's regional office in Seattle told ADEC:

> [I]n order to justify economic infeasibility, the Region believes that the economic impact analysis conducted in the draft permit should have gone beyond a review of cost effectiveness to include an analysis of whether requiring Cominco to install and operate the more effective control strategies [*i.e.*, SCR] would have any adverse economic impacts upon Cominco specifically.

Rec. 50-004 – 50-005.

At the same time, EPA told other owners and operators in Alaska that the agency would not "make the same demands for PSD permits for rural utilities which install similar generators," but instead "will continue to be sensitive to affordability of environmental control technologies for future permit applicants." Rec. 62-001 – 62-002. In short, EPA's new economic analysis turns on the size and profitability of the owner/operator. The presumably richer ones, like Cominco, must pay for the most stringent control technologies, regardless of how the costs of those technologies compare to those imposed on comparable sources. The presumably poorer ones, like the Alaska electric utilities, will be permitted to use less stringent and less costly technologies.

Although EPA's current economic impact analysis is unsupported by either the statutory language or history, it is arguably the EPA's prerogative to change its own view of economic factors that it would consider, if it were the decisionmaker, in making a discretionary BACT decision. *But*

cf. Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."). It is quite another thing, however, for the agency to impose its changed views on a state permitting authority that has relied on EPA's longstanding approach and has discharged its duty to select BACT painstakingly and in good faith.

Here, the record makes clear that ADEC undertook the economic analysis outlined in EPA's New Source Review Manual and EAB decisions. The essential inquiry in the economic analysis is how the cost-effectiveness of SCR on MG-17 compares to the cost-effectiveness of SCR or other NOx-reduction controls found as BACT for other similar sources. *See supra* at 4-5. Yet, as ADEC worked on that comparative analysis, EPA insisted that no technology may be rejected as too expensive if it costs less than $10,000 per ton of NOx removed – without reference to how the actual costs compare to costs allowed in other similar circumstances. The arbitrary $10,000 cut-off stemmed not from the statute or its legislative history, not from any EPA regulations, not from any EPA guidance documents, and not from any court decisions. Rather, it was articulated in a January 1999 letter from an EPA staffer. *See* Rec. 21-013 – 21-014, 21-020 (ADEC internal document referencing and relying upon letter); J.A. 126 (September 1999 EPA letter to ADEC continuing to rely upon $10,000 figure); *see also* Rec. 22-035 (ADEC internal memorandum documenting conversation in which author of letter reiterated $10,000 figure).

There is no legal basis for any across-the-board BACT cost-effectiveness cutoff, much less for the arbitrary $10,000 figure. The apparent references for the claimed cutoff were two examples involving different types of sources and a different pollutant, at least one of which was not based on a BACT determination but on an EPA allegation that was later

withdrawn. Rec. 22-035; Petitioners' Supplemental Excerpts of Record 463-64. Moreover, ADEC stated in the Final TAR that it had contacted each of EPA's regional offices to see whether there is a standardized cost that is considered excessive for BACT, but "the Department found that there does not appear to be a uniform cost policy that is used throughout the country." J.A. 206.

Although the figure was unsupportable, it became a primary basis for EPA's challenge to ADEC's cost-effectiveness analysis and, in turn, for EPA's intervention in this case. J.A. 126. EPA's brief to this Court is notable for its failure to mention, much less defend, the $10,000 purported baseline that figured so prominently in EPA's override of ADEC's discretionary BACT determination. These circumstances – a single staffer's imposition on a state permitting agency of an arbitrary cutoff for the key economic test for BACT – underscore the baselessness of EPA's enforcement orders.

2. For the first time in this proceeding, EPA takes issue with ADEC's statement that "because Cominco had agreed to install Low NOx on *all* its generators, ADEC's permit decision was expected to result in *lower* overall NOx emissions than would occur if SCR – the EPA's preferred technology – were installed on only the MG-17 generator." ADEC Br. 13 (quoted in part in EPA Br. 45) (emphasis in original).

It is undeniable that two of Cominco's preexisting engines – MG-2 and MG-6 – were not subject to BACT and, therefore, that Cominco was not required to install any new control technology on those engines. J.A. 156-57. Moreover, ADEC reasonably found that if SCR were required as BACT for the new MG-17 generator, Cominco would be unlikely to use MG-17 except on a standby basis in light of its significantly higher operating costs. As ADEC recognized, "[t]he higher operating cost of SCR . . . provides an economic incentive for Cominco to reduce the operating time

of the SCR unit. Following this reasoning, Cominco may choose one of the two units fitted with SCR as the standby unit in order to reduce operating costs." J.A. 87.[3] Thus, if SCR were required for MG-17, Cominco would operate four generators full-time with Low NOx controls (MG-1, and MG-4 through MG-6), and two generators full-time with a less stringent control (MG-2 and MG-6), with one largely unused standby unit (MG-17). That standby unit would result in little or no emissions reductions, and there would be no reductions at all from the two exempt full-time units. By contrast, if all seven units were equipped with Low NOx, with six operating full-time, overall emissions would unquestionably be reduced because of the reductions realized from the more stringent controls on the MG-2 and MG-6 units.

Ultimately, ADEC did not include the emissions-netting approach in the Final TAR. But that was in direct response to *EPA's* policy change on the appropriateness of using such an analysis. In March 1999, when ADEC first proposed a calculation based on combined NOx emissions, EPA approved of that approach. Six months later, after ADEC released its Preliminary TAR, EPA withdrew its support of that rationale. J.A. 243-44; Petitioners' Excerpts of Record ("PER") 388, 430. EPA's opposition to the concept, however, finds no support in the statute. Thus, in considering the reasonableness of ADEC's action, it is entirely appropriate to recognize that the *result* of that action will be cleaner air, which is the ultimate goal of the statute.

In determining whether a source will increase emissions so as to trigger BACT review, it is well-settled that a particular device is not considered in isolation; rather, emissions may

[3] As of May 1999, when ADEC issued the Preliminary TAR, the agency still was considering BACT for two engines – MG-5 and MG-17. Ultimately, Cominco agreed to an emissions cap for certain generators, which avoided triggering BACT review for MG-5. J.A. 149, 197.

be "bubbled" so as to consider the entire facility's overall impact:

> [T]he PSD provisions express a purpose of ensuring that economic growth occurs in a manner consistent with preservation of clean air. The bubble concept is precisely suited to preserve air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement.

Alabama Power Co. v. Costle, 636 F.2d 323, 402 (D.C. Cir. 1980) (footnote omitted). *See also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (upholding "bubble" concept as applied to other provisions of Clean Air Act).

There is no reason why the same concept cannot apply when reviewing whether a State has acted arbitrarily or capriciously in rendering a discretionary BACT determination. The statute specifically directs a weighing of the "environmental . . . impacts," among other factors, of a particular technology choice. 42 U.S.C. § 7479(3). Thus, when considering the reasonableness of Alaska's technology choice in this case, the Court should reject EPA's invitation to disregard overall environmental benefits that technology will have. Indeed, as next shown, Cominco's permit will have no adverse effect on the surrounding environment no matter how the case is considered.

II. COMINCO'S PERMIT WILL NOT RESULT IN HARM TO THE ENVIRONMENT

The facts do not warrant the subtext in EPA's and its supporters' briefs that the permit granted to the Red Dog Mine will be detrimental to both the environment and the Native Alaskan population. The Mine has led to limited development in an otherwise undeveloped part of the state, but the PSD program expressly contemplates industrial development within clean-air areas of the nation, and it leaves those

"growth management decisions . . . for resolution by the states." *Alabama Power*, 636 F.2d at 364. Here, ADEC made a reasonable accommodation of economic growth in a rural area that will have *no* impact at all on the air quality in surrounding areas.

As noted, ADEC's decision will result in greater emissions reductions than if EPA's preferred solution were employed. But even if one considered only the emissions from the MG-17 generator, the Cominco permit will have no impact at all on the surrounding environment. Using Low NOx controls on MG-17, the total NOx emissions would remain well below the NAAQS threshold for public health and welfare, and also below the PSD increment (which is set at 25% of the NAAQS threshold). *See* 40 C.F.R. § 50.11(b); *id.* § 51.166(c); J.A. 155, 230. In fact, as the former ADEC Commissioner explained to EPA, the increase in emissions from using Low NOx instead of SCR "*is basically undetectable at the facility boundary* – less than 1 microgram per cubic meter. No people would be affected by using SCR instead of low NOx." PER 430 (emphasis added). Thus, any increased emissions will not stray beyond the uninhabited mine.[4]

---

[4] EPA errs in describing the Mine as a population center with "[m]any workers . . . housed within its boundaries." EPA Br. 4. There are no permanent residences at or in the vicinity of the Mine; rather, workers spend intervals of time working on-site before returning, by plane, to their homes. *See Communities: Red Dog Mine* (Nov. 15, 2002) (available at: http://www.beringsea.com/communities/index.php?community=312). While on-site, and particularly in the frigid conditions that exist much of the year, employees spend as much time as possible indoors. *See* Richard W. Phelps, *Leader of the Pack – Red Dog Mine "Grows Up,"* Eng'g & Mining J. (May 1998) (available at: http:/e-mj.com/ar/mining_leader_packred_dog/). Nor is there any community, large or small, "nearby" the Mine. EPA Br. 4. Kivalina (population 377) and Noatak (population 428) are, respectively, approximately 50 miles and 35 miles away. U.S. Census Bureau, *U.S. Census 2000: Alaska: 2000* ("*U.S. Census*") 13, 15 (June 2003); Rec. 17-125; *Alaskan Communities: Northwest Arctic Census Region* (available at: www.ilovealaska.com/alaska/boroughs.cfm?bid=28). The Mine is located 90 miles north of Kotzebue (population 3,082), the next closest town, and 100 miles north of the Arctic Circle. *U.S. Census* at 14; Rec. 17-067. Denali National Park, located 420 miles southeast, is the nearest Class I attainment area – the most protected "clean air" area under the Clean Air Act. Rec. 17-009. In short, contrary to EPA's suggestion, the Mine is in an extremely remote and sparsely populated location. *See also* ADEC Br. 7-9.

Similarly, there is no factual basis for the contention of several amici that the projected increase in NOx emissions could harm nitrogen-sensitive vegetation in the Noatak National Preserve. Kivalina Br. 4; Environmental Defense Br. 20 n.22. ADEC has reviewed two years of on-site vegetation studies and five years of off-site vegetation studies at a comparable site, both of which showed no detectable impact on the tundra vegetation. PER 430.[5]

Finally, ADEC properly took account of Cominco's special role as one of the few sources of economic activity for a disadvantaged community in a remote and inhospitable locale. The agreement between Cominco and the NANA Regional Corporation, Inc. ("NANA") for development and operation of the Mine is unique in both its commitment to the local Native Alaskan population and the control vested in NANA

---

[5] One of EPA's amici raises unrelated environmental compliance issues. Kivalina Br. 3-5. Dust pollution from the haul road between the port and Mine, and allegations of impacts of Mine operations on downstream waters, have nothing to do with ADEC's authority to determine Low NOx controls as BACT for the MG-17 generator. Thus, it is not surprising that EPA has not relied on any of these allegations and concerns – all of which have been or are being cooperatively addressed by EPA and ADEC through voluntary actions, agreements, revised permits, and studies – as the basis for EPA's intervention in ADEC's permitting decision.

to ensure that local social and environmental needs are met. The 1982 agreement between Cominco and NANA provides for payment of a substantial annual royalty to NANA, protection of Native Alaskan subsistence resources, training, hiring, contract and purchasing preferences for NANA members, and NANA approval of changes in the Mine's size. *See* Teck Cominco Alaska Incorporated, *A Unique Partnership at the Red Dog Mine: A Model of Cooperation* (available at: http://www.teckcominco.com/presentations/dh-rd-partner-may02.pdf). Red Dog is a model of sustainable development due to its approximately 40 years of reserves and Cominco's commitment to NANA for the life of the Mine. *See* NANA & Cominco, Ltd., *Shared Values, Common Goals, Exceptional Results: The Red Dog Mine Story* 7, 9 (available at: http://www.teckcominco.com/articles/operations/rd-shared values.pdf).

It true that economic and environmental impacts "must always be weighed" against each other in the BACT analysis. Kivalina Br. 5. But that is precisely what ADEC did in this case, after considering the comments of all interested parties. The question is whether that weighing is to be done by the approved State agency that is necessarily closest to the facts and circumstances, or a federal agency operating from offices thousands of miles away. Congress provided a clear answer.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted,

ROBERT T. CONNERY
MARCY G. GLENN
HOLLAND & HART LLP
555 17th Street
Suite 3200
Denver, Colorado 80202

LAWRENCE L. HARTIG
ROBERT J. MAHONEY*
HARTIG RHODES HOGE
& LEKISCH
717 K Street
Anchorage, Alaska 99501
(907) 276-1592

* Counsel of Record

Counsel for Teck Cominco Alaska Incorporated